No. 3629

IN THE 2

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

vs.

CHARLES PAGANINI, as administrator of the estate of David K. Marlow, deceased,

Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

BRIEF FOR APPELLEE.

WALTON C. WEBB,
C. F. REINDOLLAR,
Solicitors for Appellee.

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BRIEF FOR APPELLEE.

Statement of the Case.

We think that the following matters should be added to the statement of the case made by appellant, namely:

The insured did not execute a *change* of beneficiary as stated in appellant's brief, but merely a *direction* to change the beneficiary to Miss Jennie Heppner, who, four months after the death of insured, transferred to appellant whatever rights she acquired by virtue thereof;

Not only at the time of the execution of said direction to change beneficiary and thereafter until the death of insured, but also after the death of insured and until October 20, 1919 (almost five months after his death), when appellant purchased the claim and rights of Ben Janowitz, the policy was held by Ben Janowitz as a pledge to secure the payment of the sum of $491.12 and interest due to him from the insured;

Appellant did not *pay* the sum for which the policy was pledged, as she says in her brief, but purchased from Ben Janowitz on October 20, 1919, the said indebtedness of insured to him and said pledge and now claims that she is the owner thereof;

The policy was not presented to the company until November, 1919, which was more than five months after the death of insured, and at that time appellant demanded of the insurance company that it pay to her the proceeds of the policy, not only on the ground that she was the assignee of Miss Jennie Heppner, but also on the ground that she was the assignee of Ben Janowitz;

So that the matter may not be confused, we will now restate in a few words the facts of the case as embodied in the statement of the case made by appellant, amended as above. The material facts of the case, irrespective of the provisions of the policy, are as follows: Prior to March 18, 1918, the insured delivered and pledged the policy to Ben Janowitz as security for the payment of the sum of $491.12 and interest, which pledge has since continued, the

same and possession of said policy being held by Ben Janowitz until October 20, 1919, and thereafter by the appellant under assignment made by him to her on said day.

On March 18, 1918, the insured delivered to the San Francisco branch office of the insurance company a direction to change the beneficiary of the policy to Miss Jennie Heppner, the same not being forwarded to the home office of the company until after the death of the insured, which occurred on May 30, 1919. On October 1, 1919, Miss Jennie Heppner transferred to appellant whatever rights she acquired by virtue of said direction to change beneficiary.

The insured never produced the policy or delivered it to the company for endorsement thereon of the proposed change. And in November, 1919, for the first time the policy was produced, the appellant then presenting it to the company at its home office and demanding that said direction to change beneficiary be endorsed thereon and that the company pay to her the amount of the policy not only as assignee of Miss Jennie Heppner but also as assignee of Ben Janowitz.

Upon these facts, in connection with the provisions of the policy, the district court held, as contended by us, that the attempted change of beneficiary was invalid for two reasons:

First, because the policy was already assigned;

Second, because the policy was not delivered to the insurance company during the lifetime of the insured.

And in accordance with such conclusions, rendered the decree appealed from, which gives to appellant the amount due her under said pledge and to appellee, who is the administrator of insured's estate, the balance of the proceeds of the policy.

Argument.

We will discuss the two reasons, upon which the district court based its decision, in the order above named.

I.

THE POLICY WAS ASSIGNED.

The policy, as set forth in appellant's brief, provides that the beneficiary may be changed if the policy is not then assigned. So, the question to be determined is, whether the pledge to Ben Janowitz constituted an assignment within the meaning of this provision of the policy. We think there is no doubt but what it did constitute such an assignment.

The case of *Underwood v. Jefferson Standard Life Insurance Company,* 98 S. E. 832, practically so decides. This case is the only case we have been able to find where an assignment for security has been passed upon in relation to a provision prohibiting a change of beneficiary where the policy

has been assigned. In this case the policy provided, as does ours, that the beneficiary could be changed if the policy were not assigned. The policy was assigned as security, but to the insurance company, and not to a stranger. The court held that the assignment referred to in the policy meant an assignment to a stranger, and not one to the company, but did not even intimate that an assignment for security was not an assignment within the meaning of the provision that the beneficiary could be changed if the policy were not assigned. So, as the assignment with which the court was dealing was an assignment for security, the following language from page 835 of the opinion must be taken as referring to such an assignment, viz.:

> "The assignment spoken of is one to a stranger, and not one to the company, for the latter could waive any objection to the change of beneficiary, and did so by assenting to the one that was made in this case. When a stranger is assignee his rights could not be materially affected in the absence of his consent, and, consequently, the company, without authority for that purpose, could not waive for him. *The provision was inserted to prevent confusion or complication and to relieve the company from any danger of liability growing out of changing the beneficiary after the policy had been assigned."*

This case is particularly valuable because it points out the reason for a provision in a policy only allowing a change of beneficiary when the policy is not assigned. As the court said, the reason is, to prevent liability to the company from changing the

beneficiary after the policy has been assigned. In other words, to prevent double liability to the company, that is, liability to the assignee and also to the new beneficiary. Now, in the case of a change of beneficiary after an absolute assignment there is no question but what the company would be liable to each for the amount of the policy. In the case of an assignment by way of pledge the company would not be liable to each for the amount of the policy unless the loan equalled that amount, but it would at any rate be liable to the pledgee for the amount of the loan and to the new beneficiary for the amount of the policy. As double liability would exist in both cases and as an absolute assignment concededly prevents a change of beneficiary, an assignment for security must do likewise. The mere possibility that the insured may pay off the loan can not affect the matter. The company has a perfect right to protect itself against a possible double liability and it has done so when it provides in its policy that the beneficiary can be changed only when the policy has not been assigned.

It must be remembered in determining what is meant by an assignment in the provision of the policy that the beneficiary can be changed only when the policy is not assigned, that such a provision is not to be construed strictly in favor of the insured but liberally and according to the objects to be accomplished thereby. This is so because such a provision does not curtail or prescribe limitations upon a right that the insured already

had, but gives him a right he would not otherwise possess. In other words, it is undisputed law that, if the policy does not give the insured the right to change the beneficiary, the beneficiary can not be changed at all (see *Yore v. Booth,* 110 Cal. 238). There are numerous other cases, but we deem it unnecessary to cite them, as the proposition is so well settled.

Giving such a provision a liberal construction and one consonant with the object to be accomplished thereby, to wit: the prevention of double liability to the company, an assignment must be held to include a pledge as well as an absolute assignment.

Counsel for appellant argues in his brief that a pledge does not pass the legal title to the pledgee, and that, therefore, the pledge to Ben Janowitz was not an assignment of the policy. Even if the title does not pass it would be absolutely immaterial, since the object of a provision prohibiting a change of beneficiary when the policy is assigned is, as is laid down in said case of *Underwood v. Jefferson Standard Life Insurance Company,* to prevent double liability to the company, which would exist whether the policy was merely pledged or absolutely assigned. So, it is really idle to speculate as to whether or not the legal title passed to Janowitz in considering the question as to what constitutes an assignment within the meaning of the provision of the policy prohibiting a change of beneficiary when the policy has been assigned.

As a matter of fact, however, the legal title, that is, a title necessary to enable the pledgee to collect and sue upon the same, passes by a pledge, at least so far as a pledge of insurance policies or other choses in action is concerned.

See *31 Cyc.* at pages 808-9, where it is said:

> "Upon a contract of pledge, the general property in the things pledged remains in the pledgor, while a special property passes to the pledgee."

Also *Gilman v. Curtis,* 66 Cal. 116, the opinion in which was written by Justice Ross, now a judge of this court. In that case a life insurance policy was pledged, and it was held that the legal title to it passed to the pledgee. And this case was decided long after the adoption of the sections of the California Civil Code cited in appellant's brief. See also *Widaman v. Hubbard,* 88 Fed. 806, a decision by the United States Circuit Court for the Southern District of California, the opinion being written by Judge Wellborn, where it was held that the pledgee of a life insurance policy took the legal title to it and could sue the insurance company for the amount of it without interference by the pledgor, he being accountable, of course, to the pledgor for the balance of the proceeds of the policy remaining after deducting the amount of the pledge. It was also held that in an interpleader suit by the insurance company the rights of the pledgee and pledgor could be determined, that is, the pledgee could be awarded the amount of his

pledge and the pledgor the balance of the proceeds of the policy.

In addition, we would refer the court to the case of *Haber v. Brown,* 101 Cal. Reports, which is one of the authorities cited by counsel for appellant as holding that the legal title does not pass to the pledgee, but which really holds that the legal title or such a title as is necessary to enable the pledgee to collect and sue upon the pledge does pass to the pledgee. At page 453 of the opinion the court said:

> "But it seems clear, in view of the code provision (referring to Section 2888 of the California Civil Code previously referred to by the court in its opinion), that a mere endorsement of non-negotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected."

Counsel also cites said Section 2888 of the California Civil Code, which provides that a lien does not transfer title. This section, however, as construed in said case of *Haber v. Brown,* only retains in the pledgor the general property in the pledge, while the legal title or a title sufficient to enable the pledgee to collect or sue passes to him. And we would again call the court's attention to the fact that the above mentioned case of *Gilman v. Curtis,* which was decided about fourteen years after the adoption of said Section 2888, holds that a pledge

of a life insurance policy passes the legal title to the policy to the pledgee.

But, as a matter of fact, Section 2888 of the California Civil Code has no application whatsoever to the Janowitz pledge, because there is nothing to show that the pledge was made in California, and the law is that an assignment of a life insurance policy is governed by the laws of the place where it was made.

Wilde v. Wilde, 95 N. E. 295.

Counsel also quotes from the article on pledges in *31 Cyc.* to the effect that the legal title remains in the pledgor. But this statement must be deemed to be qualified by the above quoted excerpt from the same article on pledges to the effect that the general property remains in the pledgor while a special property passes to the pledgee.

The other cases cited by counsel, in addition to *Haber v. Brown,* only go to the point that the general property in a pledge remains in the pledgor, which, of course, no one disputes. The case of *Bibend v. Liverpool and London Fire and Life Insurance Company* might be thought to go farther and hold that no title of any kind passes to the pledgee, but it really does not. The question there involved was whether a pledge of a fire insurance policy nullified the insurance because it transferred the entire property in the insurance to the pledgee, who did not own the property insured and, therefore, had no insurable interest in it. The court

concedes that the pledgee had title to the policy so as to allow him to recover the amount of the policy from the insurance company, but holds, and rightly so, that the pledge of the insurance policy did not transfer the general property in it so as to nullify the insurance.

It is evident from the foregoing that the legal title, at least to the extent of allowing him to collect from and sue the insurance company upon the same, passes to a pledgee of a life insurance policy. And that is an added reason why such a pledge should be deemed to be an assignment of the policy within the meaning of a provision allowing a change of beneficiary only when the policy is not assigned.

Counsel for appellant does not raise the points, but for fear that the court might do so, we wish to show that it is no objection to the assignment to Janowitz that it was made orally or that no copy of it was filed with the company as required by the policy.

An insurance policy can be assigned orally. See *Nashville Trust Co. v. First National Bank,* 134 S. W. 311, and *Marcus v. St. Louis Mutual Life Insurance Company,* 68 N. Y. 625.

It was not necessary to file a copy of the assignment with the company. The last mentioned case of *Marcus v. St. Louis Mutual Life Insurance Company* so holds. In that case the policy provided that it could be assigned only with the written ap-

proval of the company, but did not provide that a failure to secure this would affect the assignment. The assignment that was made was not approved by the company. Held, that, nevertheless, it was valid.

This is exactly the situation in our case. Our policy provides (Transcript page 7) that a copy of the assignment shall be filed with the company, but does not provide that a failure to do so shall affect the assignment. Therefore, the assignment to Ben Janowitz was valid even though it be assumed that a copy or notice of it was not given to the company. We can not, however, assume this from the pleading (that is, the written statement) of the defendant, Herta Marlow (the appellant), but must assume just the contrary. For that pleading is silent as to whether notice of the assignment was given to the company. And, furthermore, it is apparent all through that pleading that Herta Marlow (the appellant) claims under the assignment as well as under the attempted change of beneficiary. Consequently she will not be permitted to say that the assignment was invalid.

From the foregoing discussion we think it is clear that the policy was assigned within the meaning of the provision thereof allowing a beneficiary to be changed only when the policy is not assigned. Therefore, the beneficiary could not be changed and the decision of the district court was correct. But, assuming that it could have been changed, it was not changed. And so the decision of the district

court is correct for that reason also. This brings us to a discussion of the second ground upon which the district court based its decision.

II.

THE POLICY WAS NOT DELIVERED TO THE INSURANCE COMPANY DURING THE LIFETIME OF THE INSURED.

The policy provides (Transcript pages 6-7) as follows:

> "CHANGE OF BENEFICIARY.—The insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office *accompanied by the policy for indorsement of the change thereon by the company,* and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the insured signed said written notice of change, whether the insured is living at the time of such indorsement or not."

It is plain to be seen from this provision that there are two things to be done by the insured in order to accomplish a change of beneficiary, and not merely one, as contended by appellant's counsel. He asserts that all the insured has to do is to deliver a written notice of the proposed change to the company and that the policy may be delivered to the company after his death. This, of course, can not be so.

The policy provides that the insured must deliver to the company notice of the proposed change "*accompanied by the policy for endorsement of the change thereon by the company*". This italicized language (italics ours) must have some effect. Its plain meaning is, that the policy must be delivered to the company either with the notice of the proposed change or at the latest before the death of the insured. Otherwise it would not be an act of the insured, at whose request, and at the request of no one else, can the beneficiary be changed.

We suppose that counsel gets his idea that the policy can be delivered to the company after the insured's death from the provision permitting the endorsement to be made after the insured's death. But this provision and the one requiring the delivery of the notice of the desired change and the policy have no connection. One relates to what the insured is to do and the other to what the company is to do. The obvious meaning of the two provisions is, that if the insured delivers to the company during his lifetime notice of the proposed change of beneficiary and the policy, then the change may be endorsed on the policy by the company after his death. And the provision permitting the endorsement after death was undoubtedly inserted in the policy merely to prevent the contention being made that the endorsement must be made during the lifetime of the insured. For there would be no reason in denying effect to the change where the insured had in his lifetime done everything required of

him, namely, the delivery to the company of notice of the proposed change and the policy; and the company could not or did not endorse the change on the policy until after the insured's death.

We are unable to find any authorities either for or against our interpretation of the policy, but as appellant's counsel does not cite any sustaining his contention that the policy may be delivered to the company after the insured's death, we feel confident that the matter is too clear for dispute and that the correct construction of the policy is, that if the insured delivers to the company in his lifetime notice of the change of beneficiary and also the policy, then the company can endorse the change on the policy after his death.

Since, in our case, it appears that the policy was not delivered to the company during the lifetime of the insured, and there is no showing that the insured made any effort to get the policy and present it to the company, in other words, that he tried to do everything required of him to accomplish a change of beneficiary, there has not been, under the authorities, a change of beneficiary.

> *Abbott v. Supreme Colony United Order etc.*, 190 Mass. 67.

A certificate of life insurance in a fraternal society provided that a change of beneficiary could only be made by a writing witnessed by two reputable witnesses and acknowledged before a justice of the peace or other officer, and that if not so made it would not be effectual. The insured was

sick in the hospital and signed and acknowledged before a justice of the peace a written change of beneficiary. The justice tried to get two witnesses but could not, as the rules of the hospital allowed only one visitor a day to a patient. Afterwards the justice signed as a witness and delivered the change of beneficiary to the local office of the lodge before the death of the insured. The court held that the change of beneficiary was not accomplished. It also called attention to the fact that it did not appear that what the insured desired to do was brought to the attention of the hospital authorities, as in that event they might have allowed him to have the two witnesses. In other words, the insured did not do everything he could during his lifetime to comply with the terms of the policy.

That is exactly the situation in our case. It appears from the pleading of Herta Marlow that the policy was not delivered as required thereby to the company with the change of beneficiary, or, in fact, until long after the death of David K. Marlow, the insured. And it does not appear that the insured made any effort whatever to get the policy from Ben Janowitz. Therefore, the policy not being complied with and there being no effort to comply with it, there has been no change of beneficiary.

Bagley v. Miller, 137 Ill. App. 278.

In this case after the insured was divorced from his wife he delivered to the company a written request to change the beneficiary from his wife to his sister. The company refused because he did not

deliver the policy to it, as required thereby. He tried to get the policy from his wife, but failed. Thereafter he took no further steps to effect the change of beneficiary and became more or less friendly with his wife again. Held, that it would seem that he had abandoned his intention of changing the beneficiary and that the beneficiary was not changed. The court also held that a beneficiary under a life insurance policy cannot be changed unless the policy permits, and then only in the manner prescribed thereby.

It must be presumed in our case that David K. Marlow abandoned his intention of changing the beneficiary by reason of the fact that he made no effort to get the policy from Ben Janowitz, if such presumption were necessary. But it is not, as the mere fact that he did not deliver the policy to the company during his lifetime and made no effort to get it so that he could deliver it is sufficient to defeat the change of beneficiary.

> *French v. Provident Savings Life Assurance Society,* 91 N. E. 577.

The insured delivered a change of beneficiary to the company but did not deliver the policy to the company, as required thereby, saying that she could not find the policy but would send it when she found it. The company informed her that she could make application for a duplicate policy so that the change could be endorsed thereon, but she never did anything about obtaining the duplicate.

Held, that the attempted change of beneficiary did not become effective.

McLaughlin v. McLaughlin, 104 Cal. 171.

Case of fraternal society insurance. The laws of the society provided that beneficiary could be changed by surrendering the certificate and having a new one issued. The certificate was payable to the nephews and nieces of the insured. After his marriage he handed the certificate to his wife and told her it was hers. Upon his deathbed he asked his brother to have a new certificate issued to his wife. His brother gave him to understand that he had attended to it. This was not true. Held, that there was no change of beneficiary. Held, further, that this case was not one where the surrender of the certificate or policy is excused because the insured had done everything in his power to surrender it.

Tillmann v. John Hancock Mutual Life Insurance Co., 50 N. Y. S. 470.

The policy in this case, which was payable to the estate of insured, provided that the insured could change the beneficiary with consent of the company by written notice to the company. Insured signed a paper changing the beneficiary to the plaintiff and delivered it to a branch office of the company, which forwarded it to the home office, where it was received before the insured's death. The branch office received it back from the home office the day of the insured's death, but without the company's consent, and with a letter asking the reason for

the change of beneficiary and for other information. Thereafter the company refused its consent to the change. The court held that no change of beneficiary had been made. And also that the company could not give its consent after the death of the insured, for then the rights of the original beneficiary were vested.

De Silva v. Supreme Council, 109 Cal. 373.

In this case a change of beneficiary was attempted to be made by will. The court held that this could not be done, saying that all acts to be done by the insured in order to effect a change of beneficiary must be performed by him during his lifetime.

Counsel for appellant states that we cited on the argument in the district court cases that were not in point because they involved policies where the change of beneficiary was to be endorsed on the policy during the lifetime of the insured. In this he is mistaken, although it does not make a particle of difference whether the endorsement is to be made after or before death so far as the provision of the policy, requiring the insured to deliver to the company notice of the change as well as the policy, is concerned. Counsel is also mistaken in his statement that the case of *Supreme Lodge v. Price,* which, however, we did not cite, is not in point for the same reason. In that case there was nothing requiring the change of beneficiary to be endorsed by the company during the lifetime of the insured, yet the court held that the insured must deliver to the company not only a request for the

change but the policy (certificate of insurance) as well. The language from the opinion, quoted on pages 15-16 of appellant's brief, might seem to excuse the presentation of the certificate to the company by the insured in case the request for the change was delivered to it and there were substantial, although purely sentimental, reasons for the proposed change. But this language is purely dictum, since the request for the change was not delivered to the company, and is, furthermore, contrary to all the authorities, which, at the most, only excuse the presentation of the certificate or policy when the insured has done everything in his power in order to deliver it. In any event, however, this language has no application to our case, as there are no reasons whatsoever shown for the proposed change of beneficiary to Miss Jennie Heppner.

Although appellant's counsel does not raise them, we wish to clear up two points for fear that the court might have some doubt about them.

First. A change of beneficiary from the executor or administrator of the insured to a named beneficiary is the same as any other change of beneficiary.

Lewis v. Reed, Vol. 32 Cal. App. Dec. 1009.

This case was decided July 29, 1920, and a rehearing has been denied by the Supreme Court of California. It does not expressly appear from the opinion of the court, but it does so appear from the original record of the appeal on file that the policies were payable to the executor or administrator of

the insured. The insured sought to change the beneficiary to plaintiff, an individual, but did not comply with the provisions of the policies as to a change of beneficiary. The court held that the change was ineffective, and at page 1010 of the opinion said:

> "To permit a substitution of an individual in lieu of the executors or administrators of an insured's estate, certainly would work a material change in the contract, and one which, under the terms of the policy, required the assent of the insurer in the manner prescribed before becoming effectual."

Tillmann v. John Hancock Mutual Life Insurance Co., 50 N. Y. S. 470 (cited above).

This case holds the same thing. There the policy was payable to the estate of insured and he sought to change the beneficiary to an individual.

Second. The fact that the policy is payable to the executor or administrator of the insured "or to the duly designated beneficiary" can not entitle the insured to change the beneficiary from his executor or administrator to a designated beneficiary without complying with the provisions of the policy relating to a change of beneficiary. Appellant's counsel did, however, contend to the contrary in the district court, but as he has abandoned his contention in this court, he has undoubtedly concluded that the district court was right in disapproving his contention, as it most certainly was.

Counsel's contention was that the insured could name a beneficiary without complying in any way with the provisions of the policy. In other words,

that the company had nothing to do with the matter, and that if he named a beneficiary such person became the beneficiary under the policy without further action on his or the company's part. This surely can not be so.

Counsel apparently went on the theory that the policy did not designate a beneficiary when it was made payable to the executor or administrator of the insured and that the naming of a beneficiary was an original designation and not a change of beneficiary. But in this he is mistaken. We have seen from the cases above cited that if a policy is made payable to the executors or administrators of the insured, such persons are the beneficiaries of the policy and that the naming of a person in place of them is a change of beneficiary. And the policy itself and the application therefor show plainly that the executors or administrators of the insured were intended to be and actually were designated as beneficiaries of the policy. See page 12 of the Transcript, where there is set forth the following provision of the policy:

> "Miscellaneous Provisions—the policy and the application therefor, copy of which is attached hereto, constitute the entire contract",

and also the following provision of the application therefor signed by the insured:

> "I designate as beneficiary to receive the proceeds of policy in event of death, and reserve the right to change the beneficiary from time to time—beneficiary (give name in full) estate."

And see page 2 of appellant's brief to the same effect.

See also page 11 of the Transcript where it appears that the different provisions of the policy are indexed on the margin thereof and that opposite the indexing word "beneficiary" there appear the words "to the executors, administrators", etc.

So it is apparent that the executors or administrators of the insured are the beneficiaries of the policy; therefore, the naming of another person as beneficiary must be a change of beneficiary and must be done according to the provisions of the policy regarding a change of beneficiary.

If this were not so then a beneficiary could be named although the policy was assigned, in which event the company would be subjected to double liability. Such a result would most certainly not be tolerated.

Another thing to be remembered in this connection is, that the words "designated beneficiary" are preceded by the word "duly". This word must have some significance. Its plain meaning is, "according to the terms of the policy". Therefore, the words "duly designated beneficiary" mean a beneficiary designated according to the terms of the policy. In other words, as the executors or administrators were already the beneficiaries of the policy, if the insured desired to name another person

as beneficiary he must do so "according to the terms of the policy", namely, by complying with the terms thereof in regard to a change of beneficiary.

And it must be borne in mind that the words "to the duly designated beneficiary", as used in this connection, undoubtedly do not mean, to such person as the insured may duly designate, but to such person as may be named, that is, called by name, as beneficiary, the executors or administrators not being, of course, called by name. In other words, the word "designated" is not referring to the act of appointing a beneficiary, but to the person who may be named, that is, called by name, as beneficiary, selected pursuant to the terms of the policy in regard to a change of beneficiary.

And further it must not be forgotten, as we have shown above, that provisions in a policy regarding a change of beneficiary are not to be construed in favor of the insured but liberally and so as to carry out the objects to be attained thereby, since provisions relating to a change of beneficiary do not curtail a right the insured already had but give to him a right he did not before possess, namely, the right to change the beneficiary.

We think it must be apparent to the court that the beneficiary was not changed because the policy was not delivered to the company during the lifetime of the insured, and that the decree of the district court is correct not only for that reason but because the beneficiary could not be changed for

the reason that the policy was assigned. We, therefore, respectfully ask that the decree be affirmed.

Dated, San Francisco,
March 1, 1921.

WALTON C. WEBB,
C. F. REINDOLLAR,
Solicitors for Appellee.